

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES E. STITHEM
Claimant

VS.

CESSNA AIRCRAFT CO.
Self-Insured Respondent

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Docket No. **1,012,897**

ORDER

Claimant requests review of the March 25, 2008 Order entered by Administrative Law Judge Nelsonna Potts Barnes. This is a post-award proceeding for penalties and attorney fees. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett of Wichita, Kansas appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the post award record and adopted the stipulations listed in the Order.

ISSUES

This workers compensation claim was resolved by an Agreed Award dated September 17, 2004. The Agreed Award specifically provided that respondent was responsible for authorized and related medical incurred to date. A medical bill was later received by claimant and forwarded to respondent's counsel but a few months later claimant again received the same bill from the provider. An application for penalties for failure to pay the medical bill was then filed and a penalty hearing was held on March 15, 2005. At the conclusion of the penalty hearing, the Administrative Law Judge granted respondent additional time to submit the documentation to support its argument that the bill had been paid but the provider had not credited the money to the correct account.

The ALJ did not enter a decision until an Order dated March 25, 2008. The ALJ's order denied claimant's request for a penalty because respondent had paid the bill but the

provider had credited the amount to the wrong account. The ALJ further ordered respondent to pay \$450 in attorney fees to claimant's counsel pursuant to K.S.A. 44-536. The ALJ explained the delay in the decision was caused when the file was inadvertently placed inactive and had remained with the inactive files until claimant had finally inquired about the matter.

Claimant requests review and argues that the attorney fees award should be increased. After the penalty hearing the claimant's attorney submitted a brief to the ALJ and attached an itemization of time spent on the post-award issue. Claimant's attorney indicated 8.7 hours had been spent on this matter and requested attorney fees at \$150 per hour or \$1,305. Claimant argues that respondent never responded to the medical bill being forwarded with a demand for payment nor to the application for penalties. Then just before the penalty hearing was scheduled to proceed respondent's counsel explained the provider's accounting error but did not provide any documentation to support his contention the bill had been paid and refused to agree to pay attorney fees for the time claimant's attorney had spent on this post-award matter. Consequently, claimant's attorney argues it was appropriate to proceed with the hearing and he is entitled to an award of attorney fees as listed in his itemization attached to his brief to the ALJ dated April 8, 2005.

Respondent argues the ALJ erred in awarding attorney fees because respondent had paid the \$30 medical bill and had so informed claimant's counsel outside the hearing room before the penalty hearing was taken up by the ALJ. Respondent further argues that comments in the ALJ's Order indicate that she thought the award of attorney fees was mandatory when, in fact, they are discretionary under the current fact situation where penalties are denied. Respondent also argues it had contacted the provider and resolved the billing discrepancy and had notified claimant's counsel of that fact just before the hearing. Consequently, respondent argues it should not be assessed attorney fees where it had resolved the matter which only proceeded to hearing because of claimant's attorney's assertion that he was entitled to attorney fees. In the alternative, respondent argues that if the Board determines it appropriate to award attorney fees it should affirm the ALJ's Order awarding attorney fees in the amount of \$450.

The issues for Board determination are whether claimant's attorney should be awarded post-award attorney fees and, if so, in what amount.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

The facts are not seriously disputed and have been gleaned from the attorneys' arguments to the ALJ at the March 15, 2005 post-award hearing on claimant's application for penalties.

On September 17, 2004, the parties entered an Agreed Award to resolve this claim. The right to future medical and review and modification were left open and it was specifically provided that respondent was responsible for authorized and related medical incurred to the date of the Agreed Award.

After the Agreed Award was entered the claimant received a \$30 bill from Kansas Imaging Consultants for x-rays taken as part of the medical treatment related to her claim. Apparently, that bill had already been submitted to respondent's counsel in connection with a 20-day demand for payment on July 7, 2004. Claimant's attorney assumed that it had been paid since he did not hear anything further until January 2005. When claimant was again billed in January 2005, claimant's counsel filed an application for penalties with the Division of Workers Compensation on January 18, 2005. On January 28, 2005, the Division sent a form Notice of Hearing/Application for Penalties to the parties and counsel. Claimant's counsel then set the penalty hearing for March 15, 2005.

Claimant's counsel noted that he never received any response from respondent to either his demand for payment of the bill back in 2004 or even after the application for penalties was filed in 2005. It was not until the date of the hearing on March 15, 2005, that respondent's counsel indicated that he thought the bill had already been paid.

On the date of the penalty hearing, respondent's counsel told claimant's counsel that the bill had been paid March 4, 2004, but the provider had credited the wrong account. But respondent's counsel did not have any documentation to support his argument.

The matter proceeded to hearing and claimant's attorney requested penalties for respondent's failure to pay the \$30 medical bill to Kansas Imaging Consultants. Attorney fees in the amount of \$150 an hour for 3 hours were also requested by claimant's counsel.

Respondent's counsel argued at the penalty hearing that it was not respondent's fault that payment of the bill was not properly credited to claimant's account by the provider. Respondent's counsel further argued that the bill had been paid and the accounting error by the provider should not result in penalties against respondent.

THE COURT: Mr. Burnett, what are the respondent's objections?

MR. BURNETT: Your Honor, as I explained to Mr. Wilson before we came in here, this bill has actually been paid. It was paid in March of '04. There was a batch of checks that were issued for several different patients, meaning there were several services that were paid in one check. Apparently Kansas Imaging has credited a portion of that check appropriately to the proper patient's accounts. But it is my understanding that Mr. Stithem's case was not credited appropriately. The adjuster has been in communication with Kansas Imaging concerning this issue. Kansas Imaging has requested now a copy of the check that was issued so that they can

correct the account. Broadspire issued the check to Prism on February 12th of 2004. Prism issued a check to Kansas Imaging on March 4th of 2004. So over a year ago we have already issued a check and payment on this. Frankly, I think once Kansas Imaging gets a copy of Broadspire's check confirming payments on these accounts, they will be able to credit the account correctly and this issue will go away.

THE COURT: Do you have with you today a copy of the check?

MR. BURNETT: No, I do not have a copy of the check. I talked to the adjuster this morning by cell phone. She has requested a copy of the check from corporate Broadspire. Some of the problem with this has been that the file has been closed because it has been resolved. But I should have it within the next day or two showing the check had been issued and to provide Kansas Imaging to properly credit the account.¹

At the conclusion of the hearing, the ALJ held the case open for five days to allow respondent time to produce documentation to support its argument that the \$30 medical bill had been paid. The ALJ further indicated that she was going to follow the statute on attorney fees but advised the parties to let her know if they had an argument on that issue.

By letter dated March 17, 2005, respondent's counsel provided the ALJ with a copy of the check indicating the medical bill had been paid prior to July 7, 2004. Furthermore, respondent's counsel asked that the ALJ deny claimant's request for penalties. It was noted, in pertinent part, in the March 17, 2005 letter:

Clearly, I believe that my client has conscientiously and timely complied with the provisions of the previous agreed award, and it would be an injustice to award post-award attorney fees against the respondent when the error in accounting did not rest with the respondent, but rather the health care provider.

Finally, I also take issue with three hours of time at \$150.00 per hour as being excessive for these post-award proceedings.

On April 11, 2005, claimant's counsel filed a letter with the ALJ which noted in pertinent part:

In the case at hand, while respondent had previously paid the bill in question, the healthcare provider continued to bill the claimant. When claimant counsel submitted the billings to respondent and their counsel, all they had to do was simply advise claimant counsel that the bill had previously been paid. Respondent and/or their counsel could have easily worked the matter out with the healthcare provider prior to claimant counsel having to go through the process of filing all the

¹ M.H. Trans. (Mar. 15, 2005) at 5-7.

documentation and pleadings, only to be told on the day of the hearing that respondent counsel “thought” that the underlying bill was paid without any supporting documentation of the same. Claimant counsel certainly would not have filed the pleadings and scheduled the matter for hearing had respondent and/or their counsel confirmed previous payment of the underlying bill.

The claimant’s attorney also provided an itemization of time spent and claimed fees of \$1,305.

This case was then apparently overlooked until the claimant’s attorney requested a status conference and the ALJ issued the March 25, 2008 Order. The ALJ denied penalties but did award claimant’s attorney fees of \$450.

The Workers Compensation Act provides that an attorney who represents an employee is entitled to reasonable attorney fees for services rendered after the ultimate disposition of the initial and original claim. The claim was settled by Agreed Award and it cannot be disputed that this was a post-award proceeding seeking penalties for an unpaid medical bill.

K.S.A. 44-536(g) allows for attorney fees, post-award, in certain situations.

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an **application for penalties** or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. **If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.**² (Emphasis Added)

The ALJ had the discretion to award attorney fees in this case.

² K.S.A. 44-536(g).

Respondent argues that the matter should have ended when it told claimant's counsel, before the penalty hearing, that the medical bill had been paid but credited to the wrong account. When claimant's counsel requested attorney fees the respondent refused. It should be noted that conducting an actual hearing is not a prerequisite for awarding attorney fees. The fact that services were provided, post award, is sufficient. Accordingly, claimant's attorney's request for fees was appropriate.

Respondent cites the *May*³ and *Naff*⁴ cases as supporting its contention that an award of attorney fees is not appropriate. The Board disagrees. The Board concludes that *Naff* is distinguishable from this claim. In *Naff*, the Board was attempting to prevent an abuse of the workers compensation system. Conversely, in this claim the Board finds that claimant's request for penalties and post-award attorney fees does not constitute an attempt to abuse the system. The Board finds that claimant's attorney's actions requesting penalties for respondent's failure to pay a medical bill was proper under the facts of this case. Accordingly, *Naff* is distinguishable for two reasons: first, claimant is not attempting to abuse the workers compensation system, and second, the claimant had notified respondent regarding receipt of the billing and never received a response.

Likewise, the *May* case is distinguishable. In *May* there was no evidence contained in the record that the services claimant's attorney and office staff performed were necessary to insure the respondent paid the medical bills submitted. The record did not contain any evidence that the respondent failed to comply with the award. The ministerial services itemized and provided by claimant's attorney were not necessary to insure the respondent complied with the ALJ's order. Therefore, the attorney fees were denied.

In the instant case, claimant kept receiving billings for a medial bill that respondent had agreed to pay. Although the billings were submitted to respondent no response was provided to claimant's attorney and it was appropriate to seek penalties for the respondent's failure to pay the bill and insure compliance with the Agreed Award.

The claimant received a billing for medical treatment that respondent was obligated to pay. Claimant's counsel forwarded the bill to respondent and did not receive a response but concluded respondent had taken care of the matter. When claimant later received the same bill the claimant's attorney filed an application for penalties and scheduled a hearing. Respondent still did not respond or explain its position. And there were approximately three months from the filing until the hearing date during which respondent could have explained, as it later turned out, that the bill had been paid but credited to the wrong account by the provider. Respondent finally provided its explanation to claimant's attorney

³ *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

⁴ *Naff v. Davol, Inc.*, 28 Kan. App. 2d 726, 20 P.3d 738 (2001).

just before the penalty hearing and even then had no documentation to confirm its contentions.

The Board finds no merit in respondent's arguments that claimant's attorney should not be entitled to attorney fees. After reviewing the Itemization of Attorney Fees submitted by claimant's attorney as an attachment to the April 8, 2005 submission letter to the ALJ, the Board finds that the number of hours claimed and the hourly rate are reasonable and awards \$1,305 in post-award attorney fees for claimant's attorney's services.

Lastly, in the event claimant's attorney requests additional attorney fees for the time spent preparing for the Board review, K.S.A. 44-536(h) provides that disputes regarding attorney fees are to be addressed first by the ALJ. This would include a request for additional attorney fees in connection with this review. Accordingly, any request for additional attorney fees is remanded to the ALJ for further proceedings, if necessary.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 25, 2008, is modified to award post-award attorney fees in the amount of \$1,305.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge